No. 02-1808

IN THE

Supreme Court of the United States

ALAN FRIEDMAN, SYBIL MEISEL, STEVEN LANGSOM, Trustees u/w/o BENJAMIN MEISEL, and SYBIL MEISEL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SALOMON SMITH BARNEY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the court of appeals correctly hold that Petitioners' antitrust claim was barred under the doctrine of implied immunity in light of the express grant to the SEC in section 9(a)(6) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(6) (the "Exchange Act"), of power to regulate the challenged conduct and the subsequent exercise by the SEC of its informed administrative judgment over the years not to prohibit such conduct?

RULE 29.6 STATEMENT

Respondent Coburn & Meredith has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.) is a wholly owned subsidiary of Citigroup, Inc.

Respondent Credit Suisse First Boston LLC, as successor by merger to Credit Suisse First Boston Corporation ("CSFB"), is a wholly-owned subsidiary of Credit Suisse First Boston (USA), Inc., a public reporting company which has certain publicly-traded securities and which is a wholly-owned subsidiary of Credit Suisse First Boston, Inc. Credit Suisse First Boston, Inc. is a jointly owned subsidiary of Credit Suisse Group, whose shares are publicly traded on the Swiss Stock Exchange, and Credit Suisse First Boston, which itself is a wholly-owned subsidiary of Credit Suisse Group. Except as described above, CSFB has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of CSFB.

Respondent Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown) is a wholly owned subsidiary of Deutsche Bank AG.

Respondent Donaldson, Lufkin & Jenrette, Inc. is a wholly owned subsidiary of Credit Suisse Group.

Respondent Goldman, Sachs & Co. certifies that as of August 15, 2003, the following parent corporations or publicly held corporations own more than 10% of its stock: The Goldman Sachs Group, Inc.

Respondent Lazard Freres & Co. LLC is a wholly owned subsidiary of Lazard LLC and Eurazeo.

Respondent Legg Mason Wood Walker, Inc. is a wholly-owned subsidiary of Legg Mason, Inc.

Respondent Merrill Lynch & Co., Inc. has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent Morgan Keegan & Company, Inc. is a wholly-owned subsidiary of Morgan Keegan, Inc.

Respondent Morgan Stanley (f/k/a Morgan Stanley Dean Witter & Co.) has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent NationsBanc Montgomery Securities LLC is a predecessor in interest to Banc of America Securities LLC. NationsBanc Montgomery Holdings Corporation is the parent of Banc of America Securities LLC. It owns 99.9% of the stock of Banc of America Securities LLC. The remaining .1% of the stock of Banc of America Securities LLC is owned by NB Holdings Corporation. There are no publicly held companies that own 10% or more of the stock of Banc of America Securities LLC. However, Bank of America Corporation, which is a publicly held company, owns 100% of the stock of NB Holdings Corporation, which in turn owns 100% of NationsBanc Montgomery Holdings Corporation.

Respondent NatWest Securities is a wholly owned subsidiary of the Royal Bank of Scotland Group.

Respondent Prudential Securities Incorporated is a wholly owned subsidiary of The Prudential Securities Insurance Company of America, Prudential Securities Group, Inc. and Prudential Financial, Inc.

Respondent Raymond James & Associates, Inc. is a wholly-owned subsidiary of Raymond James Financial, Inc.

Respondent Shamrock Partners, Ltd. has no parent company and no publicly traded company owns 10% or more of its stock.

Respondent UBS Financial Services Inc. (f/k/a UBS PaineWebber Inc., f/ka/ PaineWebber, Inc.), is an indirect wholly-owned subsidiary of UBS AG, a publicly-traded company.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of all Respondents.[1] In the proceedings below, Petitioners challenged as *per se* antitrust violations certain long-established practices to deter the immediate resale (known as "flipping") of shares received in the distribution of initial and secondary public offerings. Petitioners alleged that the Respondents had engaged in an antitrust conspiracy by adopting policies to deny allocations in future initial public offerings to retail brokerage customers who "flipped" their IPO shares rather than holding those shares for long-term investment. The district court dismissed Petitioners' claim on the ground of implied antitrust immunity and the United States Court of Appeals for the Second Circuit affirmed. In rejecting Petitioners' claim, the courts below concluded that the Securities and Exchange Commission ("SEC") had the authority to regulate or prohibit the challenged practices, but with knowledge that firms such as Respondents were taking action to deter flipping, had deliberately determined to allow such conduct to continue subject to monitoring by the SEC. Accordingly, both courts held that the challenged practices were immune from antitrust challenge based on the doctrine of implied immunity, as established in particular in the Court's decision in

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1. Respondents are: Coburn & Meredith; Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation); Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown, Inc.); Donaldson, Lufkin & Jenrette, Inc.; Goldman, Sachs & Co.; Lazard Freres & Co. LLC; Legg Mason Wood Walker, Incorporated; Merrill Lynch & Co., Inc.; Morgan Keegan & Company, Inc.; Morgan Stanley (f/k/a Morgan Stanley Dean Witter & Co.); NationsBanc Montgomery Securities LLC; NatWest Securities; Prudential Securities Incorporated; Raymond James & Associates, Inc.; Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.); Shamrock Partners, Ltd.; and UBS Financial Services Inc. (f/k/a UBS PaineWebber Inc., f/ka/ PaineWebber, Inc.).

United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975).

This case does not merit the granting of a petition for a writ of certiorari under the considerations outlined in Supreme Court Rule 10. In their brief, Petitioners do not contend that there is any conflict among the Circuit Courts of Appeals that would warrant the issuance of a writ of certiorari, nor could they. No issue of constitutional or other significance is raised in this case that would merit this Court's attention. Indeed, Petitioners disagree only with the conclusions of the district court and court of appeals, but do not dispute that they properly articulated the applicable rule of law. A petition that merely challenges the application of a properly stated rule is "rarely granted" by this Court. Sup. Ct. R. 10.

Instead of providing reasons why the Court should grant their petition, Petitioners predicate their argument on an untenable distinction between the "distribution" and "aftermarket" phases of public offerings of securities. They concede that, under the implied immunity principles established by this Court, the challenged conduct is immune from antitrust challenge during the distribution phase (Pet. 12-13), but contend that what they term the aftermarket phase is factually different and therefore should result in a different application of those same principles. Both the district court and the court of appeals expressly rejected this alleged factual distinction for purposes of determining whether the immunity doctrine applied and held that the same principles applied regardless of the "phase" in which the challenged conduct occurred. Moreover, the SEC – the agency charged with primary authority for the application and enforcement of the securities laws, including the conduct

at issue – submitted an *amicus* brief in the Second Circuit in support of affirmance of the district court's decision and concurring in the rejection of Petitioners' alleged factual distinction. For these and other reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

COUNTER-STATEMENT OF THE CASE

A. Petitioners' Claim

The syndicate system for underwriting fixed-price public offerings has been in wide use in the United States since the 1890s. Underwriters combine and agree among themselves, subject to numerous regulatory provisions governing such underwritings, to distribute securities to the public without violating the antitrust laws. *See United States v. Morgan*, 118 F. Supp. 621, 635-36 (S.D.N.Y. 1953). Petitioners, purporting to represent a class of retail investors in initial and secondary public offerings, nonetheless brought suit alleging a conspiracy among Respondent underwriters to "discourage" or "prevent" retail investors who bought stock in initial and secondary public offerings from reselling or "flipping" those shares for a period of 30-to-90 days. Petitioners alleged that this was accomplished by denying allocations in future initial public offerings to retail investors who "flipped" IPO shares during this period. (Am. Compl. ¶¶ 11, 60-63.) Petitioners allege that such practices amount to price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Petitioners did not allege that retail customers were actually prevented from selling their shares whenever they

wished. Nor did Petitioners contend that retail customers paid a different price in the offering than institutional customers. Instead, Petitioners claimed that the price of their shares was "artificially inflated" because the alleged conduct of the Respondents to discourage flipping by retail investors rendered their shares less valuable than the shares that institutional customers allegedly received for the same public offering price. (Am. Compl. ¶ 4.) To "facilitate" the alleged conspiracy, Respondents allegedly "encouraged the Depository Trust Corporation [sic] to develop an automated program whereby defendants could track the movement of public offering shares. . . ." (Am. Compl. ¶ 8.) The amended complaint failed to mention that the SEC approved the adoption of that system and, in doing so, expressly acknowledged that the system would facilitate the tracking of flipping in a certificateless environment. *See* SEC Release No. 34-37208, 61 S.E.C. Docket 2365, 2369 (May 13, 1996).

B. The Proceedings Below

Respondents moved to dismiss the complaint on various grounds for failure to state a claim upon which relief could be granted. In a memorandum opinion and order dated December 7, 2000, the United States District Court for the Southern District of New York (Buchwald, J.) granted Respondents' motion and dismissed the amended complaint with prejudice. *Friedman v. Salomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000) (Pet. App. 19a.). In an opinion the appellate court praised as "thorough and comprehensive," the district court found that Petitioners' antitrust claim was predicated on conduct that was lawful unless prohibited by the SEC because it was a "species of the 'pegging, fixing or stabilizing' of

securities [prices] over which the SEC has exclusive jurisdiction" under section 9(a)(6) of the Exchange Act and that the SEC's decision to permit that conduct (subject to its continuing oversight) created a clear repugnancy between the securities laws and the antitrust laws, giving rise to implied immunity from antitrust challenge. (Pet. App. 40a.) Petitioners moved for reconsideration, which was denied. *Friedman*, 2001 WL 64774 (S.D.N.Y. Jan. 23, 2001) (Pet. App. 15a.).

The United States Court of Appeals for the Second Circuit affirmed. (Pet. App. 14a.) Petitioners moved for rehearing and hearing *en banc*, but rehearing was denied and no judge requested a vote on whether to hear the case *en banc*. (Pet. App. 51a.) The parties and the court had agreed that the only issue raised by the appeal was "whether defendants' conduct [was] immune from antitrust enforcement" based on the authority and actions of the SEC under section 9(a)(6). (Pet. App. 5a.) After a review of this Court's trilogy of cases on the subject, the appellate court began by recognizing that this Court's decision in *NASD* was directly on point:

> "The facts in *NASD* are analogous to the case at bar because the statute in *NASD* 'authorizes funds to impose transferability or negotiability restrictions, subject to [SEC] disapproval.' Here, Section 9(a)(6) of the Exchange Act authorizes price stabilization mechanisms subject to SEC disapproval. The Supreme Court [in *NASD*] found that 'there can be no reconciliation of [the SEC's] authority under Section 22(f) to permit these and similar restrictive agreements with the Sherman Act's declaration that they are illegal per se,' even

though the SEC had not specifically approved the restrictive agreements." (Pet. App. 8a. (quoting *NASD*).)

The court of appeals then examined the "history of SEC regulation of price stabilization practice" and concluded that the SEC had indeed examined the issue of anti-flipping policies such as those challenged in the complaint "in both the distribution and aftermarket phases of public offerings." (Pet. App. 10a.) In so doing, the court noted that Congress was aware of these price stabilization practices when it passed the Exchange Act and did not prohibit them, instead opting to delegate regulatory power over them to the SEC in the form of section 9(a)(6). (Pet. App. 10a.) The court then cited SEC policy statements from 1940, 1953 and 1963, all of which made clear that the agency was aware of price stabilization practices, understood both the beneficial and problematic aspects of the practices, and on balance determined to permit, rather than prohibit, them. (Pet. App. 10a-11a (citing SEC Release Nos. 34-2446 (Mar. 18, 1940), 34-5194 (Jul. 5, 1955); H.R. Doc. No. 95, Pt. 1 (1963)).) In 1994, the SEC most explicitly addressed the issue of "flipping" in the aftermarket, but it again declined to prohibit price stabilization, deciding instead to monitor the situation and "'assess[] whether further regulation is warranted.'" (Pet. App. 11a (quoting SEC Release No. 34-37094, at 1740 (Apr. 11, 1996)).)

The court of appeals agreed with Respondents that "this history demonstrates that the SEC studied price stabilization and flipping repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain." (Pet. App. 12a.) The court specifically

rejected what it termed Petitioners' "artificial distinction" between activities in the aftermarket and in the distribution phase. The court recognized that actions and policies to deter flipping "pre-dated the Exchange Act and the SEC" (Pet. App. 12a), and that with the technological advances of recent years,

> "distributions have taken shorter and shorter periods of time [and] the problem of flipping – and its 'solution' of price stabilization – simply has spilled into the aftermarket as well as the distribution period. The SEC explicitly recognized this trend in its 1994 release . . . [yet] still declined to regulate price stabilization in the aftermarket when it adopted Regulation M, and we find this decision to be both deliberate and significant." (Pet. App. 12a.)

Thus, the court concluded that "Plaintiffs cannot contend that this latest action [by the SEC] concerned only distributions and not the aftermarket." (*Id.*) Insofar as they had contended that there was no inconsistency between the antitrust laws and the securities laws here because the latter also prohibited the challenged conduct, the court observed that Petitioners had "given an opposite meaning to section 9(a)(6)" and that, in fact, the statute "allows price stabilization practices that the SEC does not prohibit." (Pet. App. 13a-14a.) The court thus affirmed the District Court's decision, holding that "once the correct interpretation of section 9(a)(6) is in place – the interpretation that the District Court and defendants espouse – a finding of implied immunity is the direct consequence." (Pet. App. 14a.)

C. The SEC's Position

In counterpoint to Petitioners' assertion that the SEC has taken no position with regard to the anti-flipping practices at issue, the SEC submitted an *amicus* brief in the Second Circuit in which the agency argued that implied immunity barred Petitioners' antitrust claims and urged the court to reject Petitioners' appeal.

In its *amicus* brief, the SEC argued that section 9(a)(6) of the Exchange Act and other statutory provisions "grant the Commission plenary authority to regulate stabilization – or to refrain from regulating certain types of stabilizing conduct." (Brief of the Securities and Exchange Commission, *Amicus Curiae*, In Support of Appellees ("SEC Amicus Brief"), at 14.) In response to Petitioners' characterization that the failure to ban such practices was nothing more than "conscious neglect," the SEC recounted more than 60 years of agency consideration of stabilization practices, including policies to deter flipping, and in particular, its recent adoption of Regulation M, where the Commission decided "not to propose regulations explicitly governing aftermarket activities intended to stabilize the price of newly offered securities, but instead to gather data to the extent and nature of certain of those activities in order to allow it to determine whether regulation is appropriate." (SEC Amicus Brief, at 24-27). Moreover, the SEC pointed out the inherent fallacy in Petitioners' position:

> "Plaintiffs seem to contend that conduct is permissible only if the Commission has adopted a regulation specifically permitting it, but that conclusion is contrary to the language of the relevant statutes, and it would give the

> Commission the impossible task of not only identifying every type of stabilizing conduct that it is regulating, but also of exhaustively listing all the sorts of stabilizing conduct that it is not regulating, and even of anticipating the development of new practices. As previously shown, the Commission has not chosen specifically to bar or regulate it. That is not 'conscious neglect;' it is considered policy." (SEC Amicus Brief, at 35.)

REASONS FOR DENYING THE WRIT

Petitioners do not invoke any of the factors ordinarily considered by the Court in deciding whether to grant a petition for a writ of certiorari. Petitioners do not attempt to argue that the court of appeals has "entered a decision in conflict" with either another court of appeals or a state court of last resort. Sup. Ct. R. 10(a). Petitioners cannot contend either that the court of appeals decided "an important question of federal law that has not been settled by this Court" or that "conflicts with the relevant decisions of this Court." Sup. Ct. R. 10(c). To the contrary, this case involves a proper application of this Court's decision in *NASD*, in which the Second Circuit clearly held that section 9(a)(6) of the Exchange Act authorized the anti-flipping practices at issue, subject to SEC disapproval. As in *NASD*, the SEC was well aware of the challenged practices and elected not to prohibit them.

Petitioners merely repeat the same factual argument regarding the exact boundaries of the SEC's regulatory efforts regarding anti-flipping practices that has already been rejected by both the district court and court of appeals. They argue that the SEC has authorized stabilization practices

only as part of the initial distribution of securities, but not in the so-called "aftermarket" for these securities. (Pet. 13-17.) Petitioners make no serious effort to explain why what the courts below termed a "fairly fact-specific inquiry" (Pet. App. 6a) is of sufficient importance to require the Court's attention. Indeed, petitions of this sort, where the lower court has properly stated a rule but Petitioners contend that the court has either misapplied it or arrived at erroneous factual conclusions, are "rarely granted." Sup. Ct. R. 10. Moreover, as explained below, there is simply no significance for purposes of the implied immunity doctrine to Petitioners' factual distinction between the initial distribution of securities and the aftermarket for these securities. The SEC has long been aware of stabilization practices in the so-called aftermarket but has elected not to regulate or prohibit these practices. For this reason, and because the petition raises no issues worthy of the attention of this Court, the petition should be denied.[2]

A. The Implied Immunity Doctrine

Implied immunity analysis in the field of securities regulation is governed by the principles established in three decisions of this Court: *Silver v. New York Stock Exchange,*

2. In a strained effort to justify review by this Court, Petitioners note that the appellate opinion in this case has been cited favorably in one other Second Circuit opinion and has been cited by defendants in motions to dismiss in three other cases pending in the Southern District of New York. (Pet. 3 & n.1.) These facts hardly demonstrate that this matter is worthy of certiorari. Moreover, after the present petition was filed, motions to dismiss on implied immunity grounds were denied in two of the three cited cases (No. 00 Civ. 7804 and No. 98 Civ. 7890). Petitioners' counsel is also counsel for the putative plaintiff classes in those two cases.

Inc., 373 U.S. 341 (1963); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

In *Silver*, which involved an antitrust challenge to the NYSE's denial of its members' request for direct telephone connections to non-members located in Texas, the fundamental question presented was "whether the Securities Exchange Act ha[d] created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws." *Silver*, 373 U.S. at 347. This Court focused on whether the SEC had power to regulate the conduct at issue – specifically, enforcement of exchange rules – and held that since it did not, there was no implied immunity from the antitrust laws in that case. The Court stated, however, that if "review of [the challenged conduct] [had been] provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would [have been] presented." *Id.* at 360.

This Court refined its implied immunity analysis in *Gordon*, which challenged the system of fixed commission rates maintained by the American and New York Stock Exchanges. Based on an extensive review of the legislative and regulatory history relating to commission rates in the securities industry, the Court (affirming the decision of the Second Circuit) determined that the challenged conduct was immune from antitrust challenge. In doing so, the Court rejected the contention of the Justice Department that immunity could be implied only where there was a "pervasive regulatory scheme," and instead held that the doctrine also applied where the SEC has been vested with specific regulatory authority over the activity at issue and has exercised that authority. *Gordon*, 422 U.S. at 688-89.

In *NASD*, a companion case to *Gordon* with significant similarities to this one, the Court reviewed a Justice Department challenge to various restrictions imposed by mutual funds on the resale of mutual fund shares by investors. The Court held that implied immunity was not limited to situations where, as in *Gordon*, an agency has expressly regulated challenged conduct, but could also apply where an agency has been delegated exclusive responsibility over an area and has elected not to impose restrictions. In *NASD*, the Court held that implied immunity was dictated by section 22(f) of the Investment Company Act, which authorized mutual funds to impose restrictions on secondary trading as long as those restrictions did not contravene such "rules and regulations as the Commission may prescribe." *NASD*, 422 U.S. at 720-21 (quoting 15 U.S.C. § 80a-22f).

NASD is particularly apposite given the strikingly similar language of the statute at issue in that case and of section 9(a)(6) of the Exchange Act, applicable here. The statute at issue in *NASD* prohibited mutual funds from restricting "the transferability or negotiability" of their shares "in contravention of such rules and regulations as the [SEC] may prescribe." *See* 15 U.S.C. § 80a-22(f). As Petitioners do here, the Justice Department had argued in *NASD* that implied immunity was not available because the SEC had never issued express regulations permitting the challenged secondary trading restrictions. *Id.* at 726. The Court rejected this argument, concluding that "[t]he Commission's acceptance of [these] restrictions for more than three decades hardly represent[ed] abdication of its regulatory responsibilities." *Id.* at 728. "The SEC's election not to initiate restrictive rules or regulations," the Court reasoned, reflected "an informed administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the

problems of the industry" and constituted "precisely the kind of administrative oversight . . . that Congress contemplated when it enacted [section] 22(f)." *Id.* A determination that the challenged agreements were immune from liability under the Sherman Act therefore was warranted because there was "no way to reconcile the Commission's power to authorize [them] with the competing mandate of the antitrust laws." *Id.* at 721-22; *see also id.* at 729-30 ("[i]n this instance the antitrust laws must give way if the regulatory scheme established by [Congress] is to work.").

Here, section 9(a)(6) prohibits transactions "for the purpose of pegging, fixing, or stabilizing the price of" securities that are "*in contravention of such rules and regulations as the Commission may prescribe. . . .*" 15 U.S.C. § 78i(a)(6) (emphasis added). As with the provision at issue in *NASD*, section 9(a)(6) of the Exchange Act clearly *permits* transactions undertaken for the purpose of pegging, fixing or stabilizing the price of securities, "subject to Commission disapproval," *NASD*, 422 U.S. at 726, thus (as in *NASD*) expressly supplanting the "paradigm of competition" in this respect. And as in *NASD*, the SEC's determination – in the course of its decades-long scrutiny of anti-flipping practices in the "aftermarket" – not to adopt specific regulations with regard to the conduct Petitioners challenge "hardly represents abdication of its regulatory responsibilities." *NASD*, 422 U.S. at 728. To the contrary, it unquestionably reflects "an informed administrative judgment" that the current state of regulation of that activity strikes the appropriate balance. *Id.*[3]

3. *See also Finnegan v. Campeau Corp.*, 915 F.2d 824, 831 (2d Cir. 1990) ("That the SEC has chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices once shareholders are properly informed of them, does not reduce the SEC's supervisory authority over such agreements.").

As the district court correctly observed, "implied immunity may be found not only where an administrative agency has regulated, but also where it has scrutinized conduct over which it has clear regulatory authority and has consciously chosen to allow the conduct to continue unregulated." (Pet. App. 17a (citing *NASD*).)

Under *NASD*, immunity from the antitrust laws will be implied where (i) Congress has granted the SEC authority over the conduct at issue and the SEC has exercised that authority, whether by permitting the conduct, regulating it or otherwise, and (ii) the application of the antitrust laws would be inconsistent with the actual or potential exercise of the SEC's authority to regulate the conduct and could thus subject the defendants to conflicting standards. Both conditions are met here, and this case is therefore governed by *NASD*, as the court of appeals held.

B. Section 9(a)(6) Provides the SEC with Direct Authority to Regulate the Conduct at Issue, Which the SEC Has Exercised

1. Statutory Authority

In enacting the Exchange Act, Congress provided the SEC with direct regulatory authority over all the conduct challenged in the amended complaint. Congress was aware of the widespread use of price stabilization measures to facilitate the distribution of new offerings. Because those measures were in common use and the evidence regarding their economic effects was unclear, Congress decided to "proceed cautiously" and not to outlaw such conduct outright. *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934); *see also* S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934).

Instead, Congress authorized stabilizing activities, subject to SEC regulation, through section 9(a)(6), which provides that:

> "It shall be unlawful for any person, directly or indirectly . . . (6) To effect either alone or with one or more persons any series of transactions for the purchase and/or sale of any security registered in a national securities exchange for the purpose of pegging, fixing or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78i(a)(6).

The plain language of section 9(a)(6) authorizes the SEC to permit, prohibit, or regulate the challenged price stabilization practices at issue in this case. As the SEC has observed, in enacting section 9(a)(6) "Congress recognized the need for an adjustment between the interest of purchasing investors on the one hand and the needs of industry for capital funds on the other" and "assigned to [the] Commission the duty of finding a reasonable middle ground between those two objectives which are by no means always easy to reconcile." SEC Release No. 34-2446 (Mar. 18, 1940). The SEC has interpreted its authority under section 9(a)(6) as directing it to consider "all aspects of stabilization problems," including the disruptive effects of "flipping" and the practices employed by underwriters to reduce its occurrence. For over sixty years, pursuant to section 9(a)(6), the SEC has been studying the issues of stabilization and "anti-flipping" activities and, through policy statements,

releases and regulations, has been defining and refining the permissible scope of those practices. *See, e.g., id.*, SEC Release Nos. 33-7057, 34-33924, 56 SEC Docket at 1315-16 (Apr. 19, 1994); SEC Release Nos. 33-7282, 34-37094, 61 S.E.C. Docket 1713, 1737-39 (Apr. 11, 1996); *In re National Ass'n of Sec. Dealers, Inc.*, 19 S.E.C., 424, 460-61 (1945).

Petitioners here do not seriously argue that the SEC lacks statutory authority to issue express regulations, should it wish to do so, either permitting or prohibiting the very same practices they seek to challenge under the antitrust laws. (Pet. 10 (acknowledging "the possibility that the Commission might someday introduce rules" regulating price stabilization in the aftermarket).)[4] There being no room for argument that the SEC lacks statutory *authority* to deal with the challenged anti-flipping conduct, the only remaining question under *NASD* is whether the SEC has exercised its "informed administrative judgment" not to issue express regulations on the subject.

2. SEC Exercise of Its Authority

The district court engaged in a lengthy and comprehensive discussion, later adopted by the court of appeals, that described decades of scrutiny by the SEC of anti-flipping activities pursuant to its exclusive authority to regulate such practices under section 9(a)(6) of the Exchange Act. (Pet. App. 30a-40a; Pet. App. 10a-11a.) There is no need for this Court to revisit and review the thorough historical exegesis undertaken by the courts below. Nevertheless, even

4. Petitioners make a half-hearted suggestion in a footnote (Pet. 10 & n.6) that such rules "might" exceed the SEC's authority but have never offered any analysis to support this suggestion.

a brief review of the history of the SEC's actions with respect to anti-flipping activities demonstrates conclusively that the SEC has made the informed administrative judgment not to impose restrictions on the challenged practices in this case because those practices have beneficial effects, including reducing volatility and otherwise facilitating the orderly distribution of securities.

In 1940, the SEC issued its first (and still authoritative) policy statement on the question of regulating the price-stabilization of public offerings. *See* SEC Release No. 34-2446 (March 18, 1940). Describing the practice as "an integral part of the American system of fixed-price security distribution," *id.* at 9, the SEC elected to "adopt a program for the regulation of stabilization" rather than flatly prohibiting or permitting stabilization in all circumstances. *Id.* at 2. In adopting this approach, the SEC recognized that the two principal benefits of the syndicate system of security distribution – (1) "the element of certainty to the issuing corporation" and (2) "the element of speed, reflected . . . in the rapid sale of the issue to the public and in the consequent promptness of payment by the underwriters to the issuer" – were both dependent upon underwriters having the ability, when necessary, to engage in price stabilization. *Id.* at 4-5. Specifically addressing conduct now called "flipping," the SEC also recognized that underwriters employed stabilization measures to counteract the disruptive effects of "'free riders' or 'speculators' who purchase [an issue] with the hope of quickly selling out and taking a profit from an early rise [in the price]." *Id.*[5]

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5. *See also id.* at 8 (recognizing possibility that "'free riders,' as well as other buyers who change their minds, will sell . . . at a time when there is a temporary imbalance between supply and demand

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Later, in its 1963 Special Study of Securities Markets, the SEC observed that, in order to encourage long-term investment, underwriters adopted practices to discourage investors from reselling new issues "for varying periods, usually 30 to 60 days." H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 526 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3013, 3017 (May 19, 1964). The 1963 study reported that penalties were imposed on salesmen or customers for flipping during that period, including revocation of salesmen's commissions and denial to investors of allotments in future public offerings. *Id.* at 525 & n.104.[6] According to the 1963 report, "[f]irms 'flagged' or identified customers who sold stock in the immediate after-market by reviewing transfer sheets; those who sold were unlikely to receive allotments of subsequent oversubscribed issues." *Id.* Salesmen were typically penalized by the withholding of their commissions if their customers resold during the post-offering period. *Id.* This is *precisely* the conduct that Petitioners challenged as an antitrust violation in the amended complaint. (*See* Am. Compl., ¶¶ 60, 67.) Yet restrictions on such practices were not included among the report's 208 recommendations for regulatory or legislative action.

More recently, in connection with the adoption of Regulation M (17 C.F.R § 242.104) in 1996, the SEC

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created by the offering" and that "[t]hese scattered market sales, . . . unless counteracted, will exert a market influence which, according to the underwriters, is all out of proportion to their real significance").

6. *See also id.* at 525 (reporting that "[c]ustomers found to have resold their allotments 'within a relatively short period' are not considered to be investors . . . [and were] not able to obtain allotments of subsequent underwritings of the firm").

conducted a "comprehensive review" of stabilization practices – directing particular attention to "aftermarket activities," and observing that "'stabilization' of the market may have shifted from the sales period to the aftermarket period." *See* SEC Release No. 33-7057, 34-33924, 56 S.E.C. Docket 1302 (Apr. 19, 1994). The final rules adopted by the SEC imposed new disclosure and record-keeping requirements on certain "aftermarket" activities – in particular, the use of short covering transactions and "penalty bids" by underwriting syndicates – but did not impose such obligations with respect to the anti-flipping practices at issue here. *See* SEC Release Nos. 33-7375, 34-38067, 63 S.E.C. Docket 1141, 1170 (Dec. 20, 1996).[7]

Petitioners are thus plainly incorrect in claiming that the SEC "explicitly declined to immunize" stabilization activity in the "aftermarket" for securities as part of Regulation M. (Pet. 5, 6, 15-16.) Instead, in adopting Regulation M, the SEC imposed new record keeping and disclosure obligations on certain aftermarket activities (e.g., penalty bids) and specifically rejected suggestions that it take stronger measures, deciding that the new requirements were

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7. Short covering transactions are the placing of a bid or the effecting of a purchase on behalf of the sole distributor or the underwriting syndicate to reduce a syndicate short position. A penalty bid is an arrangement that permits the managing underwriter to reclaim a selling concession otherwise owed to a syndicate member when securities sold by that member are purchased in syndicate covering transactions. (*Friedman*, Pet. App. 22a-23a.) The purpose of a penalty bid is to "encourage syndicate members to sell the securities to those persons who intend to hold them rather than engage in short-term profit-taking, i.e., to combat flipping." *See* SEC Release Nos. 33-7282, 34-37094, 61 S.E.C. Docket 1713, 1740 (Apr. 11, 1996).

"an appropriate and effective means to monitor developments in [these] aftermarket activities," while noting that it might impose additional regulation in the future. 63 S.E.C. Docket at 1170. Thus, as the district court and court of appeals correctly concluded, the proffered distinction between distribution and aftermarket does not advance Petitioners' argument. The SEC is just as aware of "aftermarket" stabilization activities as stabilization activities undertaken in initial distributions and has exercised its informed judgment concerning the regulation of both types of activities.

This conclusion is reinforced by the SEC's contemporaneous decision in 1996 to approve the adoption of the Depository Trust Company ("DTC") Tracking System – a system designed in part to *facilitate* the monitoring of "flipping" in an era when stock certificates were being replaced by book-entries of securities ownership. In approving this system, the SEC not only recognized that it would enhance the ability of syndicate managers to impose penalty bid arrangements and track customer flipping but expressly *endorsed* this feature of the system. *See* SEC Release No. 34-37208, 61 S.E.C. Docket 2365, 2369 (May 13, 1996) ("[b]y facilitating a lead manager's ability to track flipping of IPOs in a book-entry environment," DTC Tracking System would encourage underwriters to use the book-entry system, "further[ing] efficiencies and safety in the clearance and settlement of securities transactions").

C. The Court of Appeals Correctly Held that Implied Immunity Bars Petitioners' Antitrust Claim

The inconsistency prong of the implied immunity test is also met here. Implied immunity from antitrust challenge is necessary given the express delegation to the SEC, in section 9(a)(6), of authority to issue "such rules and regulations as

[it] may prescribe as necessary and appropriate" concerning anti-flipping practices both during the distribution of an offering and in the "aftermarket." The SEC has recognized its responsibility over this area, has observed the use of practices identical to those challenged by Petitioners here, and has allowed those practices to continue to protect investors and promote capital formation. Indeed, as mentioned above, the SEC has expressly stated that it has considered the issue of price stabilization specifically in the context raised by Petitioners and has decided to maintain the "considered policy" of declining regulation. Given the SEC's "considered policy" to allow such conduct to continue, the court of appeals correctly found that Respondents would be subject to conflicting standards under the antitrust laws and the securities laws if immunity from the antitrust laws were not inferred.[8]

Petitioners do not dispute the court of appeals' statement of the rule of law that pursuant to section 9(a)(6), the SEC

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8. Petitioners' claim that the SEC failed to consider the impact of aftermarket price stabilization on competition is misplaced. (Pet. 20-22.) The SEC is charged with considering competition issues, *see* 15 U.S.C. § 78c(f), 78w(a)(2), and has repeatedly done so in connection with the analysis of stabilization practices. *See, e.g.*, 63 S.E.C. Docket at 1172 (noting that Commission is required to "consider the anti-competitive effects of any rules it adopts" and concluding that Regulation M "would not likely impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act"). Moreover, the premise of section 9(a)(6), endorsed repeatedly over the decades by the SEC, is that stabilization practices are often desirable and essential to the efficient distribution of securities. Only those practices specifically identified as pernicious by the agency are prohibited. Permitting Petitioners to pursue antitrust claims under these circumstances would turn section 9(a)(6) on its head.

has the authority to permit the conduct at issue in this case. (Pet. 10.) Petitioners' disagreement with the court of appeals' decision concerns only whether the SEC has in fact exercised that authority, or whether the SEC has engaged in mere "speculation" (Pet. 10.), about the question of anti-flipping practices. This case, then, revolves around a factual question that requires an examination of the history of SEC regulation and commentary to divine what the SEC's intentions are with regard to flipping in the aftermarket. The district court and court of appeals engaged in this fact-finding effort, and both concluded that the history of SEC commentary in this area mandates the conclusion that, as Respondents contended, "the SEC studied price stabilization and flipping repeatedly yet made the administrative judgment not to regulate the practices of which plaintiffs complain." (Pet. App. 11a-12a.)

Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, where Petitioners do not dispute that the district court and court of appeals correctly stated the rule of law – that section 9(a)(6) permits price stabilization subject to SEC disapproval and that under *NASD* there is immunity from the antitrust laws even where the SEC has made a considered judgment not to adopt express rules in an area committed to its authority by Congress – Petitioners have not come close to showing why this case raises such important and unique issues that the Court should entertain a petition that would ordinarily be "rarely granted."

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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